IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.11 OF 2007

Vinodkumar Sampatkumar Jain .. Petitioner

vs

Nareshkumar Sampatkumar Jain.. Respondent

Mr.S.Sen with Mr.Amit Jamsandekar i.b M/s D.H.Law Associates for Petitioner
Mr.S.K.Jain for Respondent

CORAM : ANOOP V.MOHTA, J

RESERVED ON: 5th April, 2007
PRONOUNCED ON: 4th June, 2007

JUDGMENT

1. The petitioner has invoked section 34 of the Arbitration and Conciliation Act, 1996 and by this petition challenged the award dated 10th October,i 2006 passed by the sole Arbitrator in a dispute arising out of property i.e.Flat Nos. 62 and 63, 6th Floor, Block No.9 in Sham Nivas Cooperative Housing Society, Bhulabhai Desai Road, (the flat).

2. The petitioner and the respondent are real brothers. By an agreement dated 25th June, 1979 both of them jointly purchased the flat from one Mrs Roshan Sadarangani for a total consideration of Rs.2,75,000/-. As dispute arose, the respondent (original claimant) filed a suit bearing No. 354 of 2005 in the High Court at

Mumbai for a declaration that he has 50 % right, title and interest in the flat. Therefore, prayed for partition. In Notice of Motion No. 19 of 2006, as agreed, the Court, as consented by the parties, referred the matter to the sole Arbitrator.

3. The parties appeared before the Sole Arbitrator and filed their respective claims and counter claims/rejoinders. The parties have also filed the respective compilation of documents. The respondent did not lead oral evidence. The petitioner led evidence. After considering the rival case, the Arbitrator framed points for determination. Those are :

i) Whether the respondent proves that there was a family arrangement in the month of November-December 2000 as alleged ?

ii) Whether the respondent proves that the claimant gave up all his rights and shares in the flat in question in favour of the respondent as alleged ?

iii) Whether the Claimant is entitled to any mesne profits as claimed?

iv) Whether the respondent is entitled to deletion of the name of the claimant from the share cerrificate as claimed in the counter claim ?

v) Whether the Claimant is entitled to any relief, If so, what ?

vi) Whether the respondent is entitled to any relief ? If so, what ?

vii) What Award ?

The operative part of the above Award is as under :

"17. Considering the Statement of Claim filed, the Written Statement and Counter-Claim, the Rejoinder of the Claimant and Reply of the Claimant to the counter-claim of the Respondent, the arguments and submissions of the learned Advocates as also the authorities cited and the documentary evidence on record as also the oral evidence of the respondent and appreciating and appraising the evidence on record, I make the following Award:

(a) ordered and declared that the Claimant had and continues to have 50 % undivided share, right, title and interest in the flat bearing Nos. 62 and 63 on the 6th floor of Block No.9 in building known as Shyam Nivas belonging to the Shyam Cooperative Housing Society Limited, situated at Bhulabhai Desai Road, Mumbai - 400 036 alongwith the Respondent;

(b) ordered and declared that the Claimant has not given up his 50 % undivided share, right, title and interest in the Flat bearing Nos. 62 and 63 on the 6th floor of Block No.9 n the building known as Shyam Nivas belonging to the Shyam Cooperative Housing Society Limited, situated at Bhulabhai Desai Road, Mumbai 400 036 in favour of the respondent;

(c) ordered that the Claimant is entitled to have partition of the flat bearing Nos. 62 and 63 on the 6th floor of Block No.9 in the building known as Shyam Nivas

belonging to the Shyam Cooperative Housing Society Limited, situated at Bhulabhai Desai Road, Mumbai - 400 036 by metes and bounds in two equal parts in enforcement proceedings of this Award;

(d) The Respondent is ordered and directed to pay to the Claimant mesne profit at the rate of Rs.1,00,000/- per month with effect from 23rd December, 2005 till the date hereof amounting to Rs.9,50,000/- (Rupees Nine lacs and fifty thousand) and further from the date hereof at the rate of Rs.1,00,000/- per month till handing over possession of 50 % undivided share, right, title and interest in the flat bearing Nos. 62 and 63 on the 6th floor of Block No. 9 in the building known as Shyam Nivas belonging to the Shyam Cooperative Housing Society Limited situated at Bhulabhai Desai Road, Mumbai - 400 036.

(e) The Counter claim of the

Respondent is rejected. "

4. Admittedly, the flat was jointly purchased by the parties by an agreement dated 25th June, 1979. The society has also transferred share certificate bearing No.85 for 5 shares in the joint names on 3rd July, 1979. Both the brothers and family members were residing together in the said flat living together till 1983-84. The petitioner and all his family members shifted to another flat which was purchased jointly in the name of Sampatlal Jugraj Jain (HUF) and other family members including the petitioner. Thereafter, the petitioner along with his family members further shifted to another flat at Surya Kiran, Kemps Corner sometime in month of August, 2000. The original claimant-respondent was not residing at the relevant time in the flat. But the petitioner alongwith his family members were residing in the flat. As the petitioner refused to realise his 50 % undivided share in the flat, by letter dated 1st October, 2005 the respondent requested the petitioner to give consent for sale of the said flat and/or to buy the 50 % share in the flat. But, there was no response from the petitioner. Therefore, another notice was issued on 19th October, 2005. The petitioner admitted, in the reply, 50% share of the respondents. By referring to some discussion and consent, as alleged, the respondent ’s right had been mutually settled and thereby denied the claim of

the respondent. The respondent resisted and denied all contentions and understandings and reiterated his 50 % share and title over the property. Thereafter, the respondent filed the suit.

5. The Hon'ble Arbitrator has noted that both the brothers on 20th September, 2004 jointly requested the Secretary of the society for issuance of no objection certificate for sale of the flat. They again admitted that they had purchased the said flat jointly and further that they are in occupation of the said flat. The society replied and asked for more details and further informed that the land on which the said block has been constructed is leasehold. The maintenance bill are in the name of the respondent. The electricity connection at the said flat is in the joint names of the parties. The petitioner never claimed that he has been in exclusive possession of the said flat since 1979-80 but in view of the family arrangement claiming the exclusive right and title in the said flat. But, the petitioner failed to discharge the burden of proving the alleged family arrangement. No other family members wereexamined to substantiate the alleged family arrangement. As recorded in September/October, 2004 both the brothers by written letter requested the society to issue no objection

certificate for transfer of the said property. There is no other material brought on record by the petitioner supporting that he paid a sum of Rs.45,00,000/- to Rs.50,00,000/- in cash to the respondent except putting the said question in cross-examination. No receipt in respect of the alleged payment was produced. The respondent has purchased some other property and/or physically left the flat. That does not mean that the respondent has given up his 50 % undivided right or title in the flat in question. The material is sufficient to support the case that both the brothers are joint owners of the said flat.

6. On question of feasibility to have partition of the said flat in two equal parts, in presence of both the parties, their respective advocates informed to the Arbitrator that the carpet area of the said flat is 1300 sq.ft approximately with open adjoining terrace of 600 sq.ft as 2 entrances, doors and therefore, partition of the said flat in two equal parts is possible. In this background, once the party agreed to this mode of physical partition as the Arbitrator has accepted the same, there is no illegality in allowing such physical partition of the property. The submission that they should have been referred to the Commissioner, in the facts and circumstances is unaccepted.

7. The Arbitrator has rightly rejected the submission as raised that claim of the respondent is not time barred. As both the parties have admitted that on various occasions and later on 20th September, 2004 that they are joint owners of the said flat. So called base of arrangement of claiming exclusive right arrived in the month of November/December, 2000, was also not approved. The claim of the respondent cannot be said to be barred by limitation.

8. There is no question of estoppel in the facts and circumstances of the case, in view of the admitted correspondences and conduct of the parties about the joint purchase and ownership of the flat.

9. In so far as as the claim for mesne profit at the rate of Rs.1,00,000/- per month from the respondent as directed to be paid by the Arbitrator from 23rd December 2000, I am of the view that such an award of mesne profit is incorrect. Admittedly, both the brothers have claimed joint ownership and title over the property. Accordingly, because one brother lived in the said premises that it self cannot be reason to claim mesne profits. Admittedly, therefore the property was not partitioned till the date of the award. The petitioner therefore

was occupying the premises as co-owner of the said premises. The other co-owner therefore, cannot claim mesne profits merely because he had left the premises and other brother occupied the said premises. Such occupation by the co-owner cannot be said to be unauthorised or wrongful of 50 % undivided right or share as observed. Even otherwise, the respondent has never demanded possession for enjoyment but, all the time asserted the desire to sell the property. The award of granting mesne profit is therefore impermissible and contrary to law. However, after hearing both the parties learned counsel appearing for the respondents on instructions makes a statement that they are giving up the claim of mesne - profit in toto once the respondent or one of the party to the award gives up or not pressed any particular claim, the court specially, when claim is severable, as there is no bar under the Arbitration Act, 1996 to grant partial award and/or modify the award and in the facts and circumstances of the case, I am inclined to accept the submission raised by learned counsel appearing for the respondent. That the above, is a claim of mesne profit as severable and is therefore, set aside. The rest of the award is maintained.

10. Learned Advocate appearing for the petitioner has strongly relied on the two

judgments of this Court. First is dated 11th September, 2006 in Arbitration Petition No.135 of 2006 (M/s Project Engineers vs Oil and Natural Gas Commission), wherein on the facts of the case, as main part of the award was itself unseverable, the learned Judge has set aside the whole award which was suffering from non-application of mind. While setting aside the award the court has observed as under :

> " Perusal of the above quoted paragraph shows that the learned Arbitrator has fixed the amount of Rs.1,75,000/- when even according to the learned Arbitrator there is no material available on record to arrive at that amount. In my opinion, the above quoted paragraph in the Award is enough to set aside the entire award as it suffers from non-application of mind. The Court under section 34 of the Arbitration and Conciliation Act 1996 has no power to modify the Award. Power to modify the Award is given by Section 34 of the Act to the Court only when in the Award some claims which do not form part of the submission to arbitration are decided. In all other case the Court can either set aside the Award or can dismiss the petition and confirms the Award. As I find that the Award is required to be set aside because the findings recorded by the learned Arbitrator suffers from non-application of mind, I have no other alternative but to set aside the Award. The petition is set aside. The petitioner is left to his own remedy available in the Act. "

11. The submission that another Judge of this court by order dated 17th February, 2007 in Arbtration Petition No.370 of 2006 (Victor G.Selvan vs Hathway Cable and Datacom Pvt.Ltd & anr) has referred the matter to a larger bench by disagreeing with the view expressed by the Single Judge in Arbitration Petition in (M/s Project

Engineers) supra. As noted above. Without expressing anything on the issue, in the facts and circumstances of the case, as admittedly the party themselves giving up their rights/claims of mesne profit and as such a claim is severable and the rest of the award can be maintained. There is no point in delaying or adjourning the matter. All other matters, on different facts and circumstances, cannot be adjourned sine die.

12. I have already modified the award in following cases. In Arbitration Petition No.355 of 2004 decided no 25th April, 2007 (Union of India vs M/s Arctic India) andin Arbitration Petition No.494 of 2004 dated 4th May, 2007 (The Board of Trustees of the Prot of Mumbai vs M/s Mohinder Singh & Company) .

13. I have already taken a view based on the Supreme Court judgments whereby the Supreme Court has modified and/or granted partial award. These two judgments were not cited by the parties. I am acceding to the submissions made by the learned counsel appearing for the respondents and setting aside the claim in part and maintaining the rest of the award.

In Union of India (supra) I have observed as under :

> " After considering the facts and circumstances of the case and the provisions of Section 34 of the

Arbitration Act, I am of the opinion that the quantum of claim as granted and the quantum of the claim as rejected can be gone into as there is a case of perversity or illegality made out to the limited extent as observed above. In Krishna Bhagya Jala Nigam Ltd vs Harischandra Reddy & anr. (2007) AIR SCW 527 the Supreme Court has modified the award on the point of interest. In following case the Supreme Court has modified the award even on merit and restricted claim and interest. The Apex Court in Hindustan Zinc Ltd vs Friends Coal Carbonisation (2006) 4 SCC 445 has endorsed and accepted the modification of award by the trial court. In that case the award was challenged under Section 34 of the Arbitration Act. The trial court by the judgment, allowed the petition in part. In an appeal under Section 37 of the Act, the said judgment of the trial court was set aside and the award was upheld in entirety. However, the Apex Court has upheld the trial court's order of partial modification. The Supreme Court in Mcdermott International Inc. vs Burn Standard Co.Ltd. & Ors (2006) 11 SCC 181 has modified the award on merit as well as on interest. In Tata Hydro-Electric Power Supply Co.Ltd Vs.Union of India 2003 (4) SCC 172, the Supreme Court has modified the award. Therefore, as there is no bar under the Act to modify the award and in the facts and circumstances of the case, I am acceding to the submission made by the counsel appearing for the petitioner. Only for the above extent, the award stands modified for the above reasons. "

14. I am definitely bound by the orders passed by the Hon'ble Supreme Court. All above quoted Supreme Court judgments havenot been referred in above two judgments (M/s Project Engineers and Victor G.Selvan (supra). As noted, I have already taken the view in such other matters prior to this decision, that part of the award which is severable and as there is no bar under the Act, the court can modify the award. The

court can partially modify the award, especially when party themselves waive or gives up their particular claim or even otherwise.

15. I have no hesitation in the facts and circumstances of the cases to modify the award. The claim of mesne profit is set aside. The rest of the award as observed above is maintained.

The petition is partly allowed.

16. No costs.

(Anoop V.Mohta, J)